No. 13256

IN THE

United States

Court of Appeals

for the Ninth Circuit

WILEY JAMES WILLIAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA

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Attorney for the Appellant,
305 Barber-Lydiard Building,
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STATEMENT OF JURISDICTION

The Appellant herein, Wiley James Williams, was indicted on February 16, 1951, by a grand jury in the United States District Court, District of Montana, Great Falls Division, charged with knowingly and wrongfully failing and refusing to perform a duty required under the Selective Service Act of 1948, and the rules and regulations issued pursuant to said Act, specifically a violation of Section 462 (a) 50 U.S.C., in that on December 14, 1950, he evaded and refused to submit to induction and service and to be inducted into the Armed Forces of the United States. He was duly arraigned and tried by the Court with a jury and convicted of the crime in the indictment and sentenced to imprisonment for one year and eight months. Notice of Appeal from the judgment of conviction and sentence was given on November 17, 1951, and the Appeal docketed and filed with the Court herein on February 14, 1952.

STATEMENT OF CASE

The Appellant is a registrant of Local Board No. 18, Selective Service System, Cut Bank, Glacier County, Montana. He is a member of Jehovah's Witnesses and requested conscientious objection form No. 150 which was completed and returned on November 1, 1948. On his questionnaire he also requested exemption as a Minister of Religion and a classification of IV-D. At his request he was granted a personal hearing on September 1, 1950. Appellant's file

with respect to said personal hearing makes no reference to the Local Board's action on Appellant's request for deferment as a conscientious objector to participation in war in any form, but does note "Registrant appeared before Board at regular meetings requesting re-classification to IV-D, request denied and registrant retained in classification I-A. Registrant informed this". (R. 18). He reported for his pre-induction physical examination at the Induction Center in Butte, Montana, was examined, and found acceptable. While at the Induction Center, the officer in charge inquired whether or not the Appellant was a married man. (R. 86). This officer advised him to report to the Local Board his married status. On October 3, 1950, he reported to the Clerk of the Local Draft Board, personally and in writing, that he was married on July 13, 1950, to Matilda Arellana at Yakima, Washington. (R. 20, 88). The Draft Board Clerk then advised him that he "would be reconsidered and given a different classification." (R. 89). Appellant instead of taking an appeal to the Appeal Board expected and awaited the change of classification promised, but the Draft Board did not change his classification and Appellant was thereby prevented from taking his appeal. Important to the determination of this Appeal too is the fact that according to the testimony of the Chairman of the Draft Board, the Appellant was granted a classification as a conscientious objector and the Chairman testified that the registrant was entitled to such classification but

that Appellant insisted on IV-D classification. (R. 70, 71).

During the course of the trial, Appellant made a motion to dismiss the indictment on the grounds that the evidence produced by the Appellee was not sufficient to sustain the charge in the indictment (R. 37, 38, 39, 40, 41, 42, 43, 44) and also entered his exception to the Court's instruction to the jury that the indictment was sufficient. (R. 122). In addition, the Appellant attempted to introduce evidence and made appropriate offers of proof to show that the Local Board had failed to accord the Appellant a full, fair and impartial hearing on his classification (R. 64, 65, 66), and failed to take evidence of any kind in connection with Appellant's request, duly filed, for deferment as a conscientious objector, and refused to hear a witness produced by Appellant on such claim. (R. 67, 68). The evidence and offers of proof were refused admission by the lower court. It is also most essential to point out that the Government itself, the Appellee here, on its own initiative, opened up the question of the Board's consideration of the Appellant's classification at his personal hearing and asked specifically the Chairman of the Board if "the Board had considered everything in the Appellant's file at the time of said hearing," and the reply was in the affirmative. (R. 69). On Appellant's examination of this witness, the Court first permitted some examination as to matters in the file then closed Appellant's right to examine and in his instructions

advised the jury to ignore all of this evidence (R. 121) to which Appellant duly excepted. (R. 123).

QUESTIONS INVOLVED

Although Appellant cites twenty-seven Specifications of Error, the questions involved here can be simply and briefly stated:

1. Did the Court err in denying Appellant's Motion to Dismiss the Indictment on the grounds that the evidence produced by the Government, Appellee herein, was insufficient to sustain the charge contained in the indictment when such evidence showed only that Appellant had failed to report to his local Board for induction, but was charged in the indictment with violation of the Act "in that he evaded and refused to submit to induction and service and to be inducted into the Armed Forces of the United States" his induction and service being contingent upon his passage of certain examinations at the Induction Center and his acceptance by the Armed Forces?

2. Can the Appellant, in defense to a prosecution for a violation of the Selective Service Act, his right to appeal his classification having been prevented by the action of the Clerk of the Local Board, imputative to the Board itself, raise the questions of a denial of a full, fair and impartial hearing on his classification, the failure of the local Board to take any evidence on his claim for deferment as a conscientious objector and refusing to hear a witness produced by him as to his claim?

3. Can the Appellant, his right to appeal having been prevented by action of the local Board, raise, in defense to a prosecution for a violation of the Act, the question of bias and prejudice of the local Board against the Appellant because of his religion in a hearing on classification?

4. The Government, having previously in its own examination and on its own initiative, opened up questions considered by the Board in classification of the Appellant, did the Court err in refusing to permit Appellant to raise the question of the manner in which the local Board rejected Appellant's request for classification as IV-D as a regular Minister of Religion, and in refusing to permit Appellant to develop fully the manner in which the Board denied Appellant's claim for deferment as a conscientious objector?

5. Did the Court err in commenting in the presence of the jury that Appellant had nothing left in his case but question of intent, when the Appellee itself had actually opened up matters considered by the Board at the hearing on Appellant's classification and Appellant had produced evidence which was admitted by the Court and uncontroverted by the Government, that he had been prevented from taking his appeal by advice and action of the Draft Board Clerk, which was imputative to the Board itself?

6. Did the Court err in instructing counsel for the Appellant that in his argument to the jury counsel must confine his closing argument solely to the ques-

tion of intent and must not refer to any other matters produced at the trial when such matters had been introduced into evidence by the Appellee itself and the Appellant, and the Court had permitted its introduction during the course of trial when there was uncontroverted evidence that the Appellant had been prevented from taking his appeal by action imputative to the local Board, and when there was evidence that the Board had actually granted Appellant's claim for classification as a conscientious objector?

7. Did the Court err in instructing counsel for the Appellant that he could not discuss the elements of the indictment which had to be proved to sustain a verdict of guilty, or whether the Government had proved the crime charged in the indictment?

8. Did the Court err in instructing the jury that the Appellant was required to submit to induction to obtain judicial determination of the Board's orders and then only on Writ of Habeus Corpus after induction?

9. Did the Court err in his instructions to the jury in reading the entire criminal section of the Act, including all offenses which were defined as crimes under the Act, and stating that the entire statute applied to the case at bar, which tended to confusion and speculation on the part of the jury and constituted prejudicial error to the Appellant?

10. Did the Court err in instructing the jury that the Appellant was precluded by his failure to appeal his classification from raising the question of the validity

of the Board's order of induction when there was uncontroverted evidence properly introduced and admitted that he was prevented from taking such appeal by action imputative to the Board itself?

11. Did the Court err in instructing the jury to ignore all the evidence with reference to the administrative features of the case, particularly the classification of the Appellant and the hearing held by the Board, when the Government itself, on its own initiative, had opened up these questions, and they had actually been introduced into evidence, and when other evidence on these features went to the question of criminal intent and also to the prevention, by action imputative to the Board, of Appellant's appeal of his classification?

12. Did the Court err in denying effective and effectual aid of counsel to the Appellant by compelling Appellant and his counsel to go to trial when there was uncontroverted showing of physical inability on the part of counsel to properly prepare for trial and properly and effectively defend Appellant and did the Court not demonstrate throughout the trial a bias and prejudice against the Appellant in an assidious effort to obtain a conviction of the Appellant?

Finally, did the evidence adduced by the Government support the verdict of the jury and his conviction under the charge stated in the indictment?

SPECIFICATIONS OF ERRORS—STATEMENT OF POINTS

The Appellant adopts as his Specifications of Error the Statement of Points heretofore submitted to this Court on Appeal, and from the Judgment of Conviction and Sentence in the Court below, Appellant appeals and specifies as error that the trial Court erred as follows:

1. In denying effective and effectual aid of counsel to Defendant (Appellant herein) in violation of the due process clause of the V and XIV Amendments to the Federal Constitution, by compelling Defendant to go to trial at a date when his counsel's physical condition was such that he could not properly prepare case, and provide effective and effectual counsel;

2. In refusing to permit the introduction of evidence of marriage of the Defendant, at a time when local board was not inducting married men, when board had been properly notified of said marriage in writing prior to report for induction order, and board had ignored such information and fact, which said evidence was as follows (R. 20-30, incl.):

CROSS-EXAMINATION

By Mr. O'Connell:

Q. Mrs. Welch, I show you a form which is contained in the file which is offered here in evidence by the government and I ask you to tell the jury what it is?

A. It is just a statement made —

The Court: What is it?

A. It is a statement made by Wiley Williams saying, "I was married July 13, 1950, to Matilda Arellana at Yakima, Wash." Dated October 3, 1950.

Q. (By Mr. O'Connell): And I think you testified that he was ordered to report for induction on December 14, 1950, isn't that correct?

A. Yes, it is.

Q. Were you clerk of the draft board at Cut Bank on October 3, 1950?

A. I was not.

Q. You were not the clerk? A. No.

Q. So you would not be able to testify with reference to this particular part of the record as to any of the situation that existed at that time?

A. No, I will not.

Q. Would you be able to testify from this record which has been submitted in evidence what was done with Mr. William's notification to the board that he was married on July 13, 1950? A. No.

Q. Is there anything in the record which shows what the board did about his notification to the draft board that he was a married man?

Mr. Angland: Just a minute. Unless counsel has some basis in law for requiring the board to take some action in response to that notice there is none as required by the board.

Mr. O'Connell: Your Honor, under classification procedures I am sure the court is acquainted with the regulation which says no classification is permanent. The regulation of the Selective Service laws re-

quires a registrant to report to the board any change in his occupational or marital status, which Mr. Williams did report it to the board that he was a married man, that he was married, and the regulation goes on to say that this must be taken into consideration in view of the fact that married men at the time Mr. Williams was ordered in for induction weren't being inducted into the Army.

Mr. Angland: Well, where is that regulation? Let's see that regulation.

Mr. O'Connell: It is part 1625, reopening and considering registrants classification issued August 20, 1948, by Executive Board 9988, 13 Federal Register 4815. Section 1625.1 Classification not permanent. (a) No classification is permanent. (b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, or dependency status, or in his physical condition. Any other person should, within 10 days after knowledge thereof, report to the local board in writing any such fact. (c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps

may be taken by the local board to keep currently informed concerning the status of classified registrants."

Mr. Angland: My objection is renewed, your Honor. If I might be heard for just a moment. I don't find anything in that regulation. The Act itself without necessity of a regulation requires all registrants to keep the board informed. Section 15 of the Act, I believe it is. "It shall be the duty of every registrant to keep his local board informed as to his current address and changes in status as required by such rules and regulations as may be prescribed by the President." And the registrant did comply with that regulation, he advised the board.

The Court: Well, what difference does that make so far as the classification is concerned?

Mr. Angland: It doesn't make any as far as I can see.

The Court: The fact he notified the board he had been married, what has that got to do with it?

Mr. Angland: There isn't anything. It isn't even a request for classification, although I question whether the board would have to consider it a request.

The Court: No certificate he was married; just a note to the effect he was married at such and such a place in the State of Washington.

Mr. Angland: That is all it amounts to. The statement I believe is in the file; it is part of the original file.

The Court: I don't see how that has any application or makes any difference at all.

Mr. Angland: I don't think it does.

The Court: On classification by the board. There must be different and something more than that in the classification.

Mr. O'Connell: Your Honor, this regulation specifically says the classification is not permanent.

The Court: Of course, it is not permanent; I know that as well as you do.

Mr. O'Connell: And the registrant shall report and he reported the change.

The Court: It all depends on how the classification was conducted and what it shows and what is found.

Mr. O'Connell: I will ask the witness then, your Honor, if the board took any action with reference, if your records show if the board took any action with reference to Mr. Williams' notification to the board that he was a married man?

A. Well, no, the statement speaks for itself. It is in the record in the file. It is filed.

Mr. O'Connell: I submit, your Honor, under due process the board cannot just ignore, they can't just fail to do nothing about a change in the status.

The Court: Suppose it made no difference with the law; suppose they had a right to induct him whether married or not; then what have you to say?

Mr. O'Connell: If the regulations permitted, if the regulations at that time and the policies of the Selec-

tive Service were to induct married men, then, of course, it has no regulation.

The Court: The policy has nothing to do with it. What was the regulation? Is there any difference in the statute? Was there any reason why he shouldn't be inducted whether married or unmarried? Mr. O'Connell: The regulations provision is mandatory for deferment of married men.

Mr. Angland: Well, where it that?

The Court: Yes.

Mr. Angland: If there is such a regulation, your Honor, the board would have to take action and if there isn't, they wouldn't. I know of no such regulation.

Mr. O'Connell: Your Honor, we had a case, I wired to the Clerk of the District Court at San Diego for a case handed down in the Southern District of California involving just exactly this same point and where the Judge ruled that the board could not induct married men when the policy of the Selective Service System was not to induct them, and the court there so ruled, but the Clerk of Court did not send me the opinion. I hope I can get it before the case is concluded but if the court will bear with me, I will find the regulation which provides for the deferment of men who have a wife or children.

Mr. Angland: Your Honor, a regulation that permits is one thing. If there is a mandatory regulation that required the board, on being advised this boy was married that requires them to defer him, then we

have something; I think otherwise we are wasting the time of the court and the jury.

The Court: Yes, a regulation would be the law. If that was the law at that time and the board failed to consider it, why then there is a question. Then there is also a question whether or not he shouldn't present some substantial evidence of that fact.

Mr. Angland: I think that is absolutely right.

The Court: Following his notification. Not simply saying, I was married. Anybody could say that, and what would that amount to as evidence for the board to consider?

Mr. O'Connell: Your Honor, regulation 1622.15: "Class III-A: Registrants with dependents. (a) In Class III-A shall be placed (1) a registrant who has a wife or child with whom he maintains a bona fide family relationship in their home."

Mr. Angland: Your Honor, it is completely ridiculous to submit that to the court. This sets up what persons shall be classified or what classifications there there are and what persons shall be put in those categories. Here is a boy who has been classified in 1-A. Now then it is a question as to whether or not the board must reopen the classification upon receipt of that letter. Now there are sections that say when the registrant's classification may be reopened and considered anew, and I have that regulation before me. There is another regulation that says when the registrant's classification shall be reopened and considered anew, and that situation presented now does not come

within either of those categories. These sections 1652.2 and 1625.3 follow the very section Mr. O'Connell read to the court a few moments ago. Of course, the mere mentioning of the classification as he has done to the court, saying in class I you shall have this group, and in class 3 if you determine this fellow ought to be determined in this class, this is the class he ought to go in and falls in that category. That is what he read to tell where these persons are placed; it is quite a different situation than he has presented to the court.

Mr. O'Connell: Your Honor, the board just can't ignore the facts; it just can't deny completely the registrant to due process when he made a showing that he was married; whether it was complete or full enough or not, at least he informed the board of his martial status, and the board when it decides whether or not it renews or reopens a classification can't just ignore the facts. They can't just say, we don't know whether he is married or not. The board must give him a fair hearing; and if it doesn't have jurisdiction to issue an order to him.

The Court: I will not hear your argument now and I will defer ruling on this until I give the Government an opportunity to go into it. You have sprung something they haven't had a chance to investigate.

Mr. Angland: It is very clear, your Honor, and I can read the regulation, and I think it is so clear it won't take a moment.

The Court: Read it so we can all hear.

Mr. Angland: "Section 1625.2. When Registrant's Classification May Be Reopened and Considered Anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant"—

Mr. Angland: Now that doesn't exist.

Mr. Angland: "The government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Mr. Angland: Now I find nothing in that, and that is not a mandatory section, that is a permissive section; they may reopen on certain demands, your

Honor. The defendant in this case doesn't fall into any of those categories.

The Court: That is right. What have you to say about that?

Mr. O'Connell: I want to submit to the court an additional regulation. "1625.4 Refusal to Reopen and Consider Anew Registrant's Classification. When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request——"

The Court: Well how does that change the regulation which has been just read; there must be a request and there must be something done, some overt action on the part of the petitioner.

Mr. O'Connell: Your Honor, when the registrant here notified the board that he was married, although

he doesn't go into the technical language of saying I want the board——

The Court: He didn't comply with the regulation.

Mr. O'Connell: He did submit the change in his status, your Honor, in a written piece of paper to the board.

The Court: I will overrule your objection, Mr. O'Connell. We will go to something else.

Mr. O'Connell: Under the rules I don't think I have to save my exception, do I?

The Court: No. You can if you want to. I will stand on the regulation as read by the Assistant United States Attorney. Some further action must be taken on the part of the registrant. Proceed with some other feature of the case, Mr. O'Connell.

3. In overruling or denying, at end of Government's case, Defendant's motion to dismiss the indictment on the ground that the Government (plaintiff) had failed to prove the crime charged in the indictment;

4. In refusing the admission of evidence of Defendant's marriage for the purpose of showing a lack of criminal intent, and in sustaining the Government's objection to Defendant's offer of proof thereon (R. 58, 59, 60, 61, 62) which said evidence was as follows:

Mr. O'Connell: Your Honor, there is a decision by Judge Yankwich in Ex Parte Stewart in 42 Fed. Supp. which says that because of the provisions of the indictment saying that the defendant knowingly

and wilfully failed and refused, that evidence of why he did not report can be given.

The Court: Yes, we haven't any time to go hunting up some decision that is sprung on the spur of the moment on whether it would have any application here or not. "Knowingly and wilfully failed to perform a duty required of him under the Selective Service Act of 1948, and the Rules and Regulations issued pursuant to said act in that he evaded and refused to submit to induction and service and to be inducted into the Armed Forces of the United States." Now, what have you got on that to show lack of criminal intent there? How is that question and answer to it going to have any bearing upon the question of intent?

Mr. O'Connell: Because, your Honor, it will show why the defendant thought he didn't have to report for induction.

The Court: Well, let's hear what the witness has to say about it.

A. Well, he told me he didn't have to report because he was married.

The Court: I don't know what she said. I couldn't hear it.

A. He said he didn't have to report because he was married.

Q. Did he tell you about any discussion with Shirley Proefrock, who was the clerk of the draft board, in this connection?

A. Yes, she said he was to get III-A classification.

Mr. Carmichael: There was no question asked.

The Court: That is hearsay, almost double hearsay.

Q. What did the defendant tell you what his intent was in not reporting for induction?

A. Well, since he was married he didn't have to report.

The Court: You have already brought that out once.

Q. When and where were you and the defendant married?

A. We were married July 18, 1950, in Yakima, Washington.

Q. Had you been engaged for some time before that? A. Yes.

Q. When did you meet the defendant?

A. June, 1949.

Q. June, 1949, do you remember when you became engaged? A. No, I don't.

Q. It was sometime was it prior to July 18, 1950?

A. Yes.

Q. You don't know approximately when?

A. No, I don't.

Q. Was it in October of 1950, or of 1949, rather?

A. Some place like that, September or October.

Mr. O'Connell: Your Honor, because there was a question this morning about the record of whether or not the defendant was actually married and the lack of record in order to protect the record I would first like to mark this for identification.

Q. I show you Defendant's Exhibit No. 2 and will you tell the court and the jury what this is?

A. I don't understand.

Q. Just tell the court and the jury what this document is?

Mr. Angland: Just a minute. I will object to that question, your Honor. It is improper to ask about the document. He can ask if she knows what it is and then submit and offer it in evidence and the jury can tell what it is after it is admitted in evidence.

Q. Do you know what this document is?

A. Yes, it is a certificate of our marriage.

Q. Do you know whether or not it is genuine?

A. Yes, I know it is.

Q. Do you know who gave it to you?

A. Yes.

Q. Who gave it to you?

A. The Judge that married us, the Justice of the Peace.

Q. That married you? A. Yes.

Mr. O'Connell: We offer it in evidence, your Honor.

Mr. Angland: To which we object, your Honor. The proper place to be offered the evidence was to the Selective Service Board and not to this court; that is not now being made part of the Selective Service file for consideration by the board; the board is the one that considers the classification. It is objected to as not tending to prove or disprove any issue in this case.

The Court: No step was taken toward the assertion of any such a claim as that, no hearing was ever made——

Mr. O'Connell: Your Honor, I would like to make an offer of proof in connection with the document.

The Court: Very Well.

(The offer of proof and objection were made in the record away from the hearing of the jury).

Mr. O'Connell: The defendant offers to prove by Defendant's Exhibit No. 2 entered for identification already and objected to by counsel for the Government that the defendant, Wiley James Williams, and the witness, Matilda Williams, through whom this evidence was offered were officially and legally married on the 18th day of July, 1950, at Yakima, Washington, prior to the order to report for induction issued by Local Board No. 18, Glacier County, Montana, Selective Service System.

Mr. Angland: You don't want my objection dictated at this time, your Honor?

The Court: You might as well. You didn't make it full and complete before, just general.

Mr. Angland: It is objected to as incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in the case. This is an **attempt serve** or furnish a basis for a different classification than that fixed by the Selective Service Board and not properly a matter to be considered by the court or jury in this case, and an attempt to substitute the judgment of the court and jury here for the judg-

ment of the Selective Servic eBoard that classified the defendant in this case.

The Court: I will sustain the objection. I think I already ruled on it.

5. In fuling and in further instructing jury that no evidence was ever submitted to local board on Defendant's married status (R. 62), which said ruling was as follows:

Mr. Angland: Your Honor, we might ask the jury to disregard any reference to the marriage since the testimony did go in.

The Court: The jury will pay no attention to that evidence which has been offered here because as you recall heretofore this morning it was clearly shown that no evidence was ever made before the local board or any hearing to present any hearing on the marital status at all. That is all.

Mr. O'Connell: Your Honor, the record does show the record that was introduced by the Government itself.

The Court: You heard what I said to the jury and that goes. No hearing or proof was ever offered.

6. In refusing to permit the introduction of evidence by the Defendant of Board's failure to accord Defendant a full, fair, and impartial hearing on his classification, as affecting Board's jurisdiction to issue valid order to report for induction (R. 64), which said evidence was as follows:

Q. You were there the night he had his hearing?

A. Yes.

Q. Now I want to ask you if in your opinion if the defendant had a full, fair and impartial hearing?

Mr. Angland: Just a minute. Your Honor, I am going to object to that. I don't know why we should resist it; I assume the answer will be favorable, but I don't believe that the judgment of one member of the board as to what kind of a hearing it was is proper evidence before this court.

The Court: Or going into the subject for the jury to hear or pass upon anyway.

Mr. Angland: No. It is improper for consideration of the jury.

The Court: I will sustain the objection to it.

Mr. O'Connell: I want to ask another question and then make an offer of proof.

7. In sustaining Government's objection to offer of proof through the witness Schuette that Defendant had been denied a full, and impartial hearing by the board on his classification (R. 65, 66), which said offer was as follows:

Mr. O'Connell: Now, your Honor, I want to make an offer of proof.

The Court: All right.

(The offer of proof and objection were made away from the hearing of the jury).

Mr. O'Connell: By the witness, Phillip Schuette, the defendant offers to prove that the witness would testify that the defendant, Wiley James Williams, did not have a full, fair or impartial hearing before the local Selective Service Board on his classifica-

tion. That sometime following and before the order to report for induction issued by the said local board Phillip Schuette, the witness, Phillip Schuette, and the defendant, Wiley James Williams, sat in a car outside the Pay and Pack It grocery store located in Cut Bank, Montana, and the witness, Schuette, informed the defendant, Williams, that he did not have a full, fair and impartial hearing on his classification as made by the local Selective Service Board; that the said witness, Phillip Schuette, made these statements to defendant while a member of the local Draft Board No. 18, Glacier County, Montana, which had jurisdiction over the defendant, Wiley James Williams.

Mr. Angland: That is objected to as wholly incompetent, irrelevant and immaterial and not tending to prove or disprove any issue in the case; and it is an attempt to obtain a review of the classification of this defendant by this court and jury while the record before the court shows that the defendant did not exhaust his administrative remedies or take any affirmative action to obtain a new hearing, a more complete hearing or a hearing upon appeal.

Mr. O'Connell: That is all, Mr. Schuette.

Mr. Angland: I don't believe the court ruled upon our objection to the offer of proof.

The Court: I sustain the objection.

8. In refusing admission of evidence as to whether or not Board had considered request of Defendant

for deferment as conscientious objector (R. 67), which said evidence was as follows:

Q. What evidence was taken on whether or not he was a conscientious objector?

Mr. Angland: Now, just a minute. To that we want to object, your Honor, as attempting to try this matter before this court and jury. The record in this case shows that the defendant did not exhaust his administrative remedy; the place for review of the decision of the board was on appeal and such evidence at this time is incompetent, irrelevant and immaterial in this case.

The Court: Sustain the objection.

9. In sustaining the Government's objection to Defendant's offer of proof, through the Witness Sammons that no evidence of any kind had been taken by the local board in connection with the Defendant's proper request duly filed for deferment as a conscientious objector, and refused to hear a witness produced by Defendant as to his claim for such deferment (R. 68), which said offer was as follows:

Mr. O'Connell: Now, your Honor, I would like to make another offer of proof.

(The offer of proof and objection were made in the record away from the hearing of the jury).

Mr. O'Connell: By the witness, Duane Williams, the defendant offers to prove that no evidence of any kind was received by Local Board No. 18, of Glacier County, Montana, of the Selective Service System, in connection with and in reference to the

form which the defendant had duly filed asking for a classification as a conscientious objector opposed to both combat and noncombat duty in the military service; that by the witness, Duane Sammons, the defendant offers to prove that said board refused to hear a witness produced by the defendant, one David Broadhead, of Cut Bank, Montana, as to the conscientious objections of the defendant based on religious training and belief and not on any political, philosophical or social views of the defendant.

Mr. Angland: The same objection made to the last offer of proof.

10. In commenting and ruling in the presence of the jury that Defendant didn't make any claim to deferment as conscientious objector, in face of uncontroverted evidence to the contrary, and then commenting and ruling after objection by Defendant's counsel that Defendant had practically abandoned his claim for such deferment (R. 74, 75, 76), which said comment and ruling were as follows:

Q. Now in the record in Plaintiff's Exhibit No. 1 is there any place where the record shows that the defendant, Wiley James Williams, withdrew that claim for conscientious objector?

A. I haven't been through it to that extent. Now I just couldn't put my finger on it but he probably—you asked if we considered these things which he claimed. The board considered it. He asked us outright for 4-D; that is what he asked us for, but we couldn't grant that.

Q. But you determined he was entitled to 1-AO?

A. Yes.

Mr. O'Connell: That is all.

Q. (By the Court): Now I understand you to say a few minutes ago that he said he didn't want that?

A. He wouldn't take 1-AO so he had no choice.

A. That is right.

Q. In other words, he abandoned that claim?

A. He wouldn't take it so we had to put him back in 1-A. We had no other choice.

The Court: I understand that was your testimony in the first place he wouldn't accept it.

Q. (By Mr. O'Connell): Did he tell you that he abandoned it?

A. I don't know what you mean.

Q. Did he tell you that he didn't want it?

A. The understanding given I said he would not accept 1-AO.

Q. He would not accept 1-AO bue he actually told you he would prefer 4-D in the minister classification? A. He said he would accept.

The Court: Oh, he didn't say that.

Q. (By Mr. O'Connell): But he told you he wanted, if he could get it, the 4-D classification?

The Court: Now let's finish this examination and quit trying to test the witness' examination in that respect. We understand what he said about it. What he did say was practical abandonment of his objection as an objector, conscientious objector.

Mr. O'Connell: The record in Plaintiff's Exhibit

No. 1 nowheres, your Honor, shows that he withdrew his claim for conscientious objector.

11. In refusing to permit Defendant to develop fully question raised as to Defendant's claim for deferment as conscientious objector, the Government having previously opened up question on its examination and initiative, (R. 76, 77), which said ruling was as follows:

Mr. O'Connell: But I ask you to look at the record, part of the record in Plaintiff's Exhibit No. 1 with reference to what the Government has just raised the entry under December 1st, 1950, and tell me whether there is rejection in there of the conscientious objector claim?

A. Well it was verbal in the meeting and we couldn't give him what he asked for.

Q. I asked you with reference to the entry Government's counsel claimed that there was rejection in the record of the conscientious objector claim, and I read from this the entry of September 1st, 1950, and I ask you to tell me whether under entry of September 1st, 1950, there is rejection of claim for conscientious objector?

A. This is what took place. He didn't want 1-AO.

Q. Does that say that there?

Mr. Angland: Now just a minute. Your Honor, perhaps we have gone a little too far now.

The Court: I think so.

Mr. Angland: Your Honor, I will object to questions put to this witness to interpret the words that

happen to be used for the entry of the minute action taken by the board as recorded. The action is recorded and this witness has testified what the claim was at that time.

The Court: Now, Gentlemen, I am going to conclude this right now. We don't want any more questions propounded to this witness on that subject. This is all the repetition any of us can stand. You can go to something else.

Mr. O'Connell: I want to save an exception to the ruling of the court on that matter.

12. In refusing to admit evidence of the bias and prejudice of the local board against Defendant because of his religion, in hearing on classification, as affecting Board's jurisdiction to issue valid order of induction (R. 79, 80), which said evidence was as follows:

Q. When you considered, Mr. Sammons, the file which was before you, the record which was before you on this classification, did you take into consideration the defendant's religion?

Mr. Angland: Now just a minute. Your Honor, this is again an attempt to go into the trial of the issues considered by the board and not properly before the court at any time.

The Court: Sustain the objection.

Mr. O'Connell: Your Honor, I would like to be heard. Now the Government opened up the question of consideration of this classification, Government's counsel himself presented the record, presented the

record that was there and asked him if these were the things that went before the board. He actually opened up the question himself. The Government's counsel himself opened up the whole matter, he even said he maybe went a little further than he should. He opened up this whole question and because he opened it up I think I have a right to ask a witness whether this man's religious was considered, which is part of the record in here which shows his religion. The Government made the mistake by making, opening up this first, your Honor. The Government counsel opened up that first and asked them what they had under consideration.

The Court: Yes, that is right, he did.

Mr. Angland: Quite right, your Honor, because of a very cautiously worded offer of proof. In order to keep the record straight in this case we did to that extent.

The Court: I will let him answer that question as long as we have gone this far and I will cover the whole proposition when it comes to instructions to the jury.

The Witness: Would you restate the question?

Q. (Question read): When you considered, Mr. Sammons, the file which was before you, the record which was before you on this classification, did you take into consideration the defendant's religion?

A. Do you mean by that that we might be biased?

Q. I am not asking that. I am asking whether you took it into consideration, and after you answer

me whether you did or not, yes or no, then I will propound another question.

A. It is pretty hard to answer it yes or no.

Q. Well whatever way you can.

A. We have held no man's religion against him in their group.

Q. You wouldn't hold the defendant's religion against him?

A. We were trying to be as unbiased as possible.

Q. Do you remember a statement that Mr. Daley made about Mr. Williams at the beginning of the hearing?

Mr. Angland: Now just a minute. Your Honor, this is going away beyond this file we opened up. This is attempting to retry the matter that was heard at the special hearing held by this board and it is not proper to rehear it now before the court at this time.

The Court: I will sustain the objection.

Q. On the basis of the record which was before you, which you had on your consideration, on what grounds did you deny the defendant's request for 4-D classification as a minister of religion?

Mr. Angland: That is objected to as repetitious, your Honor, and it is improper examination.

The Court: No, we shouldn't have gone as far as we have.

Mr. O'Connell: That isn't my fault, your Honor.

The Court: I will sustain the objection. You know, of course, I will have to instruct the jury on

this course of examination that has been going on here.

Mr. O'Connell: But the Government opened up this question, your Honor.

The Court: That is all right, no matter whether they did or not we know what the law is on the subject.

Mr. O'Connell: Yes, but when the Government opens that question itself I have the right to examine the witness.

The Court: I will close it now.

13. In refusing to admit evidence of matters considered in Board's rejection of Defendant's request for classification of IV-D, as a regular minister of religion, when Government in its own examination, and on own initiatives had opened up questions considered by board in classification of Defendant prior thereto (R. 79, 80), which said evidence was as follows:

Q. On the basis of the record which was before you, which you had on your consideration, on what grounds did you deny the defendant's request for 4-D classification as a minister of religion?

Mr. Angland: This is objected to as repetitious, your Honor, and it is improper examination.

The Court: No, we shouldn't have gone as far as we have.

Mr. O'Connell: That isn't my fault, your Honor.

The Court: I will sustain the objection. You know, of course, I will have to instruct the jury on this

course of examination that has been going on here.

14. In commenting, in presence of jury, before Defendant had rested his case, that Defendant had nothing left in case but question of intent, after Government on own initiative had opened up question matters considered on Board's classification of Defendant, and Defendant had produced evidence duly admitted into the record that he had been prevented from taking appeal by advice and action of draft board clerk, imputative to Board itself (R. 87), which said comment was as follows:

The Court: Well he had a right of appeal and he didn't take it.

Mr. O'Connell: He can make a showing, your Honor, that he was prevented.

The Court: If he can make a showing of intent or some showing on the question of intent, that is about all you have got left in the case.

Mr. O'Connell: He can make a showing, if he can, that the draft board prevented him by its action from taking that appeal.

The Court: Why didn't you go into that while you had the officer on the stand if the draft board did anything in an arbitrary way to prevent him from taking an appeal?

Mr. O'Connell: Because neither Mr. Sammons nor Schuette could testify to the occurence or incident that went on that I wanted to bring out.

15. Appellant abandons Specification of Error No. 15.

16. In instructing Counsel for the Defendant that his closing argument to the jury must not refer to administrative features of the case, and actions and orders of the board, particularly when those matters had been introduced into evidence by the Government itself, and the Court had permitted evidence of this nature to be produced and introduced during the course of the trial (R. 102), which said instruction was as follows:

The Court: Very narrow, and I want to tell both of you gentlemen to begin with that I am eliminating everything in regard to the administrative features of the case and the actions and orders of the board, everything in reference to it, and I shall read an instruction that will cover that proposition precisely so I don't want any reference made to it in your arguments because it is all going to be eliminated from the jury.

Mr. O'Connell: If the court please, I—if I understand correctly that of course does not prevent counsel from discussing what the testimony of the witnesses was which was to go into the record.

The Court: No, it was injected in the record as sometimes occurs when an opening occurs before a jury in the trial of a case and over-zealous counsel inject things in there that shouldn't be there, but the court is going to take it out.

17. In instructing and ruling that Counsel for the Defendant must confine his closing argument to the jury solely to the question of intent, when other mat-

ters were properly in evidence, duly admitted by the Court, and Government had on its own initiative raised questions of matters considered by the board in its hearing on Defendant's classification (R. 102), which said comment and ruling were as follows:

Mr. O'Connell: But in our argument to the jury all of this evidence is in the case.

The Court: But it will not stay in the case after you hear my instructions. About all you have got left in your case is the question of intent, and that is all I want to hear about. Now you may proceed for the Government.

18. In instructing Counsel for the Defendant, and ruling so, that in his closing argument to the jury he could not discuss the elements of the indictment, which had to be proved to sustain a verdict of guilty (R. 102, 103), which said instruction and ruling were as follows:

Mr. O'Connell: Your Honor, is argument out about the indictment?

The Court: Why yes.

Mr. O'Connell: The essentials on proving the elements of the indictment?

The Court: Certainly, but you can't do anything about this administrative feature; that is eliminated from the case.

19. In ruling that the Defendant was not to argue to the jury whether the Government had proved the crime charged in the indictment (R. 102,103), which said ruling was as follows:

Same colloquy as appears in Specification No. 18.

20. In ruling, that in an instruction to the jury, the Court should instruct that the indictment would be held good (R. 105, 106), which said instruction was as follows:

Mr. O'Connell: His duty under this was to report to his local board, and if he violated anything it was this order to report to his local board for transportation to Butte and that is what he should have been charged with in the indictment and that is the crime with which he should have been charged with.

Mr. Angland: Just a minute. That is the crime with which he is charged and the court has passed upon that.

The Court: My instructions will cover that feature of it. That indictment will be held good.

21. In reading in his instructions to the jury the entire criminal section of the Selective Service Act of 1948, including all the offenses which could be committed and were defined as crimes under the act, and stating that the indictment was properly based upon this section, and that the entire statute applied to the case at bar, tending to confuse and speculation on the part of the jury and constituting a gross prejudicial error to the Defendant (R. 107, 108, 109), which said instruction was as follows:

Now the law on which that indictment is based I am going to read to you. It is rather lengthly and some of it would apply under different state of facts perhaps but you will find that it also applies here in

this case, and that this indictment is properly based upon this Section.

Section 462. Offenses and penalties: "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title (sections 451-470 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title (said sections referred to), rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title (under said section), or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of

him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this (said sections) or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title (said sections) unless such person has been actually inducted for the training and service prescribed under this title (said sections) or unless he is subject to trial by court martial under laws in force prior to the enactment of this title (under said sections). Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall, upon request of the Attorney General, be advanced on the docket for immediate hearing."

22. In instructing the jury that the Defendant was required to submit to induction to obtain judicial determination of the Board's orders; that indictment for failure to obey these rules precludes Defendant from raising these issues, particularly when the Gov-

ernment on its own had raised these issues in the course of the trial (R. 120) , which said instruction was as follows:

It appears that under Sec. 10(a) (2) of the Selective Service Act, rightly construed, the registrant, on pain of criminal penalties, to obey the local board's order to report for induction into the armed forces, even though the board's order or the action of the appeal board on which it is based is erroneous. In order to obtain a judicial determination of such issues, such registrant must first submit to induction and raise the issue by habeas corpus.

It follows that if the registrant is indicted for disobedience of the board's order he can not defend on the ground that the draft procedure has not been complied with or, if convicted, secure his release on that ground by resort to habeas corpus.

23. In instructing the jury that the Defendant was precluded by his failure to appeal his classification from raising the question of the validity of the Board's order, when there was uncontroverted evidence, properly introduced and admitted, that he was prevented from taking such appeal by the action of the Clerk o fthe Board, imputative to the Board itself (R. 121) , which said instruction was as follows:

The Supreme Court has held that "a limited review could be obtained if the registrant had exhausted his administrative remedies"; he never carried through the administrative process on appeal, and therefore

the subject of classification of registrant by the local selective service board about which so much has been said here in the presence of the jury, must not be considered by the jury or any reference to it by counsel. If the registrant was dissatisfied with the actions and decisions of the board he had his right of appeal.

24. In instructing the jury that the indictment was sufficient, when the evidence produced by the Government does not support a conviction on the charge actually contained in the indictment (R. 106), which said instruction was as follows:

Mr. Angland: Just a minute. That is the crime with which he is charged and the court has passed upon that.

The Court: My instructions will cover that feature of it. That indictment will be held good.

25. In instructing the jury to ignore all the evidence with reference to the administrative features of the case, particularly the classification of the Defendant and the hearing held by the Board thereon, when many of these matters had actually been introduced into evidence, others went to the question of criminal intent, and the prevention by the Board of Defendant's appeal of his classification, and when the Government itself had opened up these questions (R. 121), which said instruction was the same as set forth in Specification No. 23 above.

With reference to Specifications No. 21 - 25 inclusive, Appellant duly entered the following exceptions:

Mr. O'Connell: The defendant excepts to the in-

struction of the court that the indictment in this case is sufficient on the grounds that the evidence produced by the Government does not support a conviction under it.

At this time the defendant excepts to the instruction of the court wherein the court read the entire section of the law setting forth all of the various crimes provided by the Selective Service Law as prejudicial to the defendant in that it is confusing to the jury in that it includes many violations of which the defendant is not charged and it is thereby prejudicial to the defendant.

The defendant excepts to the first special instruction of the court in which the court instructs the jury that the defendant was required to submit to induction in order to resort to the testing, in order to resort to judicial review of the validity of his classification on the grounds that the holding of the United States Supreme Court in Estep vs. U. S., 327 U. S. 114, does not require a registrant to submit to actual induction before he can have judicial review of the validity of his classification. On the further grounds that the Government itself opened up the question of classification through the witness Sammons and the consideration which the local board gave to the record on arriving at the defendant's classification, thus making it permissible for the defendant to adduce testimony with reference to the classification of the defendant.

26. In demonstrating throughout the trial a bias and prejudice against the Defendant and in favor

of the Government, and an assiduous effort to obtain a conviction of the Defendant;

As further error, Appellant specifies as follows:

27. The evidence adduced by the Government does not support the Verdict of the Jury, and a conviction under the charge stated in the indictment.

ARGUMENT

The United States Supreme Court and this Court have by a series of decisions in cases involving the Selective Service Act rather clearly defined the right to judicial review of draft board decisions upon exhaustion of a registrant's administrative remedies, and established the point at where those administrative remedies end, just before actual induction into the armed forces. Estep v. U. S. 327 U. S. 114, Gibson V. U. S. 329 U. S. 338, Saunders v. U. S. 154 F. (2d) 873, and Lawrence v. Yost, 157 F. (2d) 44.

Appellant herein feels that the case at bar raises a new point not found in the cases cited above or any other cases. The Appellant, who was the Defendant below introduced uncontroverted testimony that he had been prevented from taking his appeal from his classification by the action of the Clerk of the draft board, which action was imputative to the Board itself. (R. 87, 88, 89, 90). He was therefore prevented from exhausting his administrative remedies, and should not be barred from pleading the defenses available to him on his trial. This case also brings to bar the additional factor that the Government

itself, Appellee here, on its own initiative opened up matters involving the appellant's classification, (R. 77, 78,) which certainly gave appellant the right to examine the witnesses on these matters following the Government's own action in opening them up.

Appellant will argue that the evidence adduced by the Government does not support the charge contained in the indictment, and that the lower Court erred in denying the motion to dismiss the indictment, and urges this court to dismiss. Erroneous prejudicial rulings, instructions and conduct of the court below are matters of serious argument in this appeal, and will be pressed in the specific argument under each specification of error.

On Specification of Error No. 1, appellant will be brief. Sole counsel for appellant suffered a heart attack shortly after his retention in the case, and after a period of confinement under doctor's order moved the court below to vacate the setting of the case for trial. (R. 5, 6.) The reasons are obvious and genuine. The record discloses what transpired on this motion; the Court suited the convenience of counsel for the Appellee, rather than the situation set forth by counsel for the appellant. (R. 7-12). This we contend was a violation of appellant's right to effective and effectual aid of counsel under the VI and XIV Amendments to the federal constitution, for what value to the Defendant in this case or the accused in any case is the appointment of counsel, if said counsel is handicapped so as to render ineffectual his aid to the ac-

cused. Due process under the above amendments is not satisfied where there is a denial of opportunity for counsel to adequately prepare a defense, and the time to recuperate from an illness so that he may properly defend his client throughout the rigor of a heated trial. See Avery v. State of Alabama, 308 U.S. 444, White v. Ragen, 324 U.S. 760, Hawk v. Olson, 326 U.S. 271.

Because it is most important, and appellant lays heavy stress thereon, we shall take up next Specification of Error No. 3, charging that the lower court erred when it overruled and denied Appellant's motion to dismiss the indictment herein on the ground that the Government had failed to prove the crime charged in the indictment. The argument hereunder shall be applied also to Specification of Error Nos. 20, 24, and 27.

Now the indictment here (R.3) charges a violation of the Act and the regulations by the Appellant, and we quote, "in that he evaded and refused to submit to induction and service and to be inducted into the Armed Forces of the United States." Now the Government called only one witness, the Clerk of the Board, who was not the clerk at the time of the alleged offense, and she testified only that the appellant had not reported to the local board for transportation to the induction center (R. 19). Now we contend that this is the crime with which appellant should have been charged, and not the crime actually contained in the indictment. We argue that the Appellant could

not commit the crime set forth in the indictment unless he did report to the local board and had gone in to the induction center, passed the physical, moral and social examination, been accepted by the armed forces, and then he could have committed the crime contained in the indictment by evading and refusing to submit to induction and service and to be inducted into the Armed Forces of the United States. Whether or not the Appellant was subject to induction and service and to be inducted into the armed forces, and therefore could evade and refuse is **contingent** upon him passing the examinations at the induction center. If he failed any of them, he would not be subject to induction. The Court of Appeals for the Second Circuit, in U. S. v . Kauten, 133 F. (2d) 703 states in a summation:

> "It is common knowledge that pending this examination, by the military authorities, actual induction is a **contingent** matter." (Emphasis supplied).

The duty to report to the local board for forwarding to an induction station is a duty separate and independent from the duty of submitting to induction and service in the Armed Forces. The violation of that duty is as clearly a crime as is the duty to submit to induction and service. Section 1632.14 of the Regulations states as follows:

> "(b) **Upon reporting for induction, it shall be the duty of the registrant** (1) to follow the instructions of a member or clerk of the local board as to the manner in which he shall be transported to the loca-

tion where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where his induction will be accomplished, (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished, (5) **to submit to induction,** and (6) **if he is not accepted by the armed forces as to the manner in which he will be transported on his return trip to the local board."**

Section 1632.15 of the Regulations states in part:

"The local board shall inform all registrants in the group that it is their duty . . . . . that they must present themselves for and submit to induction; that if they are rejected . . . . . ."

This we insist shows the separate character of each duty, that is, the duty to report to the board for forwarding to an induction station and the separate duty of submitting to induction if one is not rejected at the induction station.

In Estep v. U. S., 327 U. S. 549, the United States Supreme Court in discussing the criminal section of the Selective Service Act states:

"Section 11 makes criminal a wilful failure to perform **any duty** required of a registrant by the Act or the rules or regulations made under it. An order to report for induction is such a duty; and it includes the duty to submit to induction."

In the course of the trial counsel for the Appellee argued that the sense of that sentence was that the order to report for induction includes the duty to submit to induction. Taken out of context, Appellee's contention would appear correct, but read in the

entire context it is clear that "it" refers not to the order to report for induction but to Section 11 itself.

Appellant, who is now convicted of violation of his duty to submit to induction and service into the armed forces, could still be prosecuted for violation of his duty to report to his local board for forwarding to the induction station. We insist that his conviction under the crime charged in the indictment would not enable him to protect himself from a subsequent prosecution for the crime with which he should have been charged, and an indictment in order to be sufficient must be such that it will permit the accused to plead a judgment in bar of further prosecution for the same offense.

See: U.S. v. Behrman, 258 U.S. 280
Todorow v. U.S., 173 F. (2d) 439 (Certiorari Denied) 337 U.S. 925.
U.S. v. Josephson, 165 F. (2d) 82 (Centiorari Denied) 333 U. S. 838.

The Government here charged the Appellant with a violation of a duty which was two steps or two duties removed from the actual duty he failed to obey. We conclude that the indictment and the evidence produced by the Government at the trial are at fatal variance and the evidence produced was not sufficient to convict the Appellant of the crime actually charged in the indictment and does not support the verdict of guilty on the charge contained in the indictment, and this Court should dismiss the indictment.

Appellant combines his argument on Specifications of Error 2, 4 and 5. These specifications concern

the fact that at the time of his classification, personal hearing and order to report for induction the appellant herein was a married man and regulations at that time made mandatory the deferment of married men. The record discloses that at his pre-induction physical examination the officer in charge of the induction center advised him to report his married status to the board on his return home. This Appellant did by going to the local draft board and reporting to the clerk his married status. This was reduced to writing and placed in his file (R. 20). He was informed by the clerk that "he would be reconsidered and given a different classification." Although he did not use the technical language asking for a change in classification, he certainly reported to the board for that purpose and with that intention. True he did not definitely request in precise language a classification as a married man, but Judge Pope of this Court in Cox v. Wedemeyer, 192 F. (2d) 920, at page 922 stated—

> " . . . that the procedure established under the Selective Service Act, of 1940, was designed to fit the needs of registrants unskilled in legal procedure. . . . It does not conform with the letter or spirit of the Act or of the regulations to construe the language of Appellant's letter under the same strict rule of interpretation applicable to a formal assignment of errors."

The applicable regulation, Section 1622.15 states—

> "Class III-A, Registrants with Dependents. (In Class III-A shall be placed (1) a registrant who has a wife or child with whom he maintains a bona

fide family relationship in their home."

Now this language is clearly mandatory and not permissive, and entitled this Appellant to the appropriate classification. The Court below erred in ruling out the introduction of evidence of the marriage of Appellant under the circumstances here set forth. This was further aggravated by the Court's denial of the admission of evidence of the Appellant's marriage for the purpose of showing a lack of criminal intent and in his sustention of the Government's objection to Appellant's offer of proof thereon. (R. 60, 61, 62). This evidence was necessary to show the condition of the Appellant's mind and lack of criminal intent. He had a right to show why he did not obey the order to report for induction. See Ex Parte Stewart, 47 Fed. Supp. 445. It was error of the Court to exclude this testimony. The Court committed further error on this point when the Court instructed the jury (R. 62) to "pay no attention to that evidence which has been offered here because as you recall heretofore this morning it was clearly shown that no evidence was ever made before the local board or any hearing to present any hearing on the marital status at all." This ruling to the jury was in response to a request by the Government that the Court ask the jury to disregard any reference to the marriage. Now the record clearly shows at Pages 20 and 21, that the Appellant's written statement about his marriage was contained in his file and this testimony was given by the Government witness, the clerk to the draft

board. We may concede that Appellant was not entitled in his trial to a de novo hearing of the evidence, but it is certainly erroneous for the Judge to instruct the jury that there was no evidence submitted to the local board on this point.

Specifications of Error 6 and 7 concern the Court's refusal to permit the introduction of evidence and a denial of an offer of proof that the Appellant had been denied a full, fair and impartial hearing by the board on his classification. (R. 64, 65, 66). That the failure to grant a full, fair and impartial hearing is the basis for a dismissal of the prosecution has been decided in many cases.

Niznik v. U.S., 184 F. (2d) 972;
U.S. v. Peterson, 53 Fed. Supp. 760;
Ex Parte Stanziale, 138 F. (2d) 312.

Appellee, of course, will contend that Appellant has no right to raise these defenses because he did not exhaust his administrative remedies, but the uncontroverted evidence to which the Government offered no rebuttal of any kind, is that the Appellant was prevented and cheated out of his right to appeal and to the exhaustion of his remedies by the action of the local draft board clerk. (R. 87, 88, 89, 90). We think this Court should find that an Appellant thus prevented his appeal should not be denied the right to raise the denial of due process by the local board.

Specifications of Error 8, 9, 10 and 11 have to do with the matter of the Appellant's request for deferment as a conscientious objector. Again we must

keep in mind that Appellant was prevented from taking his appeal by the action of the board. The lower Court was certainly in error when it refused admission of evidence as to whether or not the board had considered Appellant's conscientious objector classification on the basis of authorities cited on the immediately preceding specifications, and the Court erred in refusing the offer of proof made that no evidence of any kind had been taken by the local board on this request and that the board even refused to hear a witness at the hearing as to this claim. This was indeed a denial of due process. On Specifications 10 and 11, we think we stand on good ground because prior to the rulings of the Court to which we object, the Government itself had opened up the whole question of consideration of facts and matters at the hearing on Appellant's classification. (R. 69). The Government having opened the question, the Appellant in his examination certainly had a right to go into these matters and it was reversible error for the Court to permit the Government to go into the matter and then deny the same right to the Appellant. Almost incredible was the Court's ruling that the Appellant had not made any claim for deferment as conscientious objector when the record clearly shows on Pages 69, 70, 71 and 72 that Appellant did make such a claim and it was actually allowed and granted by the local board but never officially given to him. When counsel for the Appellant insisted on the record then the Court modified his statement made in the presence

of the jury that Appellant had "practically" abandoned his claim for this classification. This Court, in Cox v. Wedemeyer, supra, covered this situation when the Court held that "a registrant's letter of appeal to the appeal board protesting his draft classification as a conscientious objector . . . solely on ground that he was a minister of the gospel did not constitute a waiver of his claim . . . that he was a conscientious objector . . . ". In line with that decision we maintain that Appellant did not waive his claim for deferment as a conscientious objector because he insisted on classification as a minister of religion and he had a right to produce this evidence at the trial. To deny it to him was reversible error. This is particularly true when the Government itself had opened up this question.

On Specification of Error No. 12, both the act and the regulations prohibit bias and prejudice on the part of the local board against a registrant because of his religion. Any order issued in conflict with this provision deprives the board of jurisdiction and renders void the order to report for induction. See Estep v. U. S. supra.; Niznik v. U. S. supra.

All of the argument with reference to Specifications of Error Nos. 8, 9, 10, and 11 apply with equal force to Specification of Error No. 13. The Appellant had a right with respect to the rejection of his classification as a minister of religion to determine if the draft board had proceeded on an erroneous basis, because if it had its denial of exemption was illegal.

See the oral opinion in U.S. v. Kose, U.S. District Court, District of Connecticut, No. 8494.

On Specification of Error No. 14, the record discloses that in the presence of the jury the Court announced (R. 87) that Appellant had only the question of intent left in the case. This was before Appellant rested his case and where he later made a definite showing, uncontroverted, that he had been prevented from taking his appeal by the clerk to the board, which action is imputative to the board itself, and particularly when the Government had opened up consideration of everything contained in the Appellant's file. The Appellant had the right to have all of these matters go to the jury under the situation that existed in this case. The whole question of the prevention of the right to appeal is most vital to this case. The Government made no attempt to rebut this evidence, although the Court gave it ample opportunity. Some explanation was made that the witness involved was unable to be present, but that is not sufficient excuse for the Government's failure. Because Appellant finds no cases in point, this question has to be argued from the standpoint of reason, logic and justice. Certainly if a person is prevented by the board from exhausting his remedies, then he cannot exhaust them and thus preserve for himself the right to raise these matters in defense. We assert that the Appellant should not be penalized by the action of the board and certainly the Government should not be permitted to take advantage of its own

wrong. We feel that when a proper showing is made that there was a prevention of appeal, then Appellant should have the right to plead these matters in the limited judicial review accorded where one has exhausted his administrative remedy. See Tung v. U. S., 142 F. (2d) 919. For the board to deprive one of his right to appeal is certainly a violation of procedural due process.

On Specification of Errors Nos. 16 and 17, Appellant contends that the Court erred seriously when it instructed Appellant's counsel not to refer to the administrative features of the case and the actions and orders of the board. Certainly when the Government itself had raised these matters and even admitted that it had (R. 79), to then tell counsel not to refer to them in his closing argument was indeed wrong. The court had permitted evidence of this nature to be produced and introduced during the course of the trial. Although Appellant under the precedents would not be permitted to discuss the matter of classification itself, it should be remembered that the Court made no finding here that there was basis in fact for the classification made by the board. Appellant then had the right to discuss any factual questions relating to the administrative factors of the case that at least went to the jurisdiction of the board to issue a valid order of induction. Estep v. U. S., supra; U. S. v. Zeiber, 161F (2d) 90. It was further uncalled for error on the part of the Court to tell counsel for the Appellant that he could discuss in his closing argu-

ment only the question of intent when the record clearly disclosed that there were other matters properly in evidence and duly admitted by the Court.

On Specifications of Error Nos. 18 and 19, Appellant thinks that the lower Court committed reversible error when he instructed counsel for the Appellant that in his closing argument to the jury he could not discuss the elements of the indictment which had to be proved to sustain the verdict of guilty, nor could he argue that the Government had proved the crime charged in the indictment. (R. 102, 103). Certainly the Government is compelled, in order to obtain a conviction, to prove the elements of the crime, and the crime itself, and Appellant surely has a right to argue to the jury whether or not the Government has done so. This seems to us almost elementary.

On Specification of Error No. 21, Appellant charges that the reading of the entire criminal section of the Selective Service Law, with all of the various crimes set forth therein, and the unfortunate language used in presenting it to the jury was most prejudicial to the Appellant. In a criminal prosecution the court may not instruct on any other crime than that charged in the indictment, so that the deliberation of the jury can be confined to that charge, and not be led to speculation and confusion on all the other extraneous matters which the Court here introduced. It is not hard to see that the jury could have predicated its verdict of guilty on crimes not contained in the indictment. Sinclair v. U. S. 265 Fed. 991 at 993.

The court below committed egregious error in instructing the jury that the Appellant was required to submit to induction to obtain judicial determination of the draft board's order, as cited in Specification of Error No. 23. Appellant merely cites again Estep v. U. S., 327 U. S. 114 and Gibson v. U. S., 329 U. S. 338, and the many times this court has gone to great length to obliterate that contention, which is still very prevalent in the District of Montana. Appellee may contend that this error was not prejudicial, because Apellant had not exhausted his remedies, but again we point out that he was prevented from doing so by the action of the clerk to the local board, and could not exhaust his remedies. This argument can be applied with equal force to our Specification of Error No. 23.

Specification of Error No. 25 speaks for itself. We believe it requires no authority to support it. The Court cannot by instruction take from the jury matters that were admitted into evidence, even by the Government itself. Certainly those facts introduced and admitted without objection as to intent, and the prevention of Appellant's right to appeal are improperly removed by this sweeping instruction, and amounted to a direction to the Jury to bring in a verdict of guilty, for all intents and purposes.

Finally, in its Specification of Error No. 26, the Appellant charges that the Court below demonstrated a bias and prejudice against the Appellant, in favor of the Government, and we think made an assiduous

effort to obtain a conviction. Counsel for appellant deeply respects and admires the Court below, but is constrained to call this Court's attention to the entire record to review the prejudicial conduct of the lower tribunal. From the denial of Appellant's motion to vacate the trial because of the serious illness of counsel to the very statement of the Court on sentencing the Defendant the record is replete with expressions of opinion, comments and remarks upon evidence that could only tend to at least intimate bias on the part of the court. Appellant cites only a few of the more glaring examples:

1) at Page 58 of the record we find upon Counsel's citation of a case in point this statement:

> "The Court: Yes, we haven't any time to go hunting up some decision that is sprung on the spur of the moment on whether it would have any application here or not."

2) his almost tender zeal to protect and to assist counsel for the government, as for instance objections to evidence made by the Court itself when counsel failed to do so; see Page 61 of the record at the bottom of the page, when the following colloquy took place:

> "Mr. Angland: You don't want my objection dictated at this time Your Honor?
> The Court: You might as well. You didn't make it full and complete before, just general."

3) At Page 62:

> "The Court: You heard what I said to the jury and that goes."

4) The entire part of the record concerning Appel-

lant's alleged abandonment of his claim for classification as a conscientious objector from Page 67-78 of the record, where the court aggressively pushed the case of the Government on a most vital point.

For addiditional instances of the Court's conduct, attention is directed to Pages 80, 84 (no objection made by Appellee but court sustains it), 85, 87, 89-90, 102, and 126, of the Record. In cases involving religious differences there should be a full effort to give the accused an impartial trial, but here we find constant and tender cooperation with the prosecution and every ruling of any consequence in its favor, constant reproof to appellant's counsel, unusual restrictions on the argument to the jury, his continual repetition that there was nothing left in the case but intent, all these indicated his opinion of the guilt of the accused with its tremendous influence on the jury. The record of course contains only the words that were uttered, and not the tones and inflections. This conduct particularly in criminal cases should be jealously watched, because it invades the province of the jury, and certainly constitutes reversible error. See U. S. v. Hoffman, 137 F. (2d) 416, at point 11.

CONCLUSION

In conclusion, we submit that the indictment herein should be dismissed. We are sure that this Court will not permit the Government to deprive a man of his rights and remedies, and then allow it to take advantage of its own perfidy. The Appellant here is

sincere and honest in his beliefs and they are undeniably religious beliefs. He has suffered for them by serving two previous penitentiary sentences for the same offense charged here. He has demonstrated thoroughly that he is a conscientious objector. The Government should be content with the two pounds of flesh it has already taken—to exact a third puts Shylock to shame, and if not in the legal technical sense, at least among ordinary people, it constitutes cruel and unusual punishment. It just doesn't seem like Uncle Sam.

Respectfully submitted,
JERRY J. O'CONNELL,
Attorney for the Appellant,
305 Barber-Lydiard Building,
Great Falls, Montana.

Service of the foregoing APPELLANT'S BRIEF, together with receipt of three (3) copies thereof is hereby admitted this.....day of June, 1952.

EMMETT C. ANGLAND,
Asst. United States Attorney,
District of Montana,
Federal Building,
Great Falls, Montana, of
Counsel for the Appellee.